No. 76-1616

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES STEEL CORPORATION,

Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

MEMORANDUM IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL

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The United States Environmental Protection Agency, by its undersigned counsel, respectfully requests that this Court deny Petitioner's Motion to Stay the effectiveness of National Pollution Elimination Discharge System Permit Number IN 0000281 pending appeal, and that this Court lift the currently operative stay of the effectiveness of said permit. The reasons why these actions are appropriate are set forth below.

I. STATEMENT

A. The Factual Background of this Case:

Petitioner, United States Steel Corporation (U.S. Steel or the Corporation), operates an integrated steel mill known as the Gary Works in Gary, Indiana. Each day the Gary

Works removes approximately 750 million gallons of water from Lake Michigan through five intakes in the Lake. The water becomes polluted during use in the manufacturing process, and it is then discharged to the Grand Calumet River and to Lake Michigan. The nearly 500 million gallons per day discharged to the Grand Calumet River through fourteen outfalls is contaminated by large quantities of ammonia, cyanide, phenol, chloride, fluoride, sulfates, oil and grease, suspended solids, zinc, and other substances. This polluted water finds its way to Lake Michigan through the Indiana Harbor Canal and the Indiana Harbor. U.S. Steel also discharges nearly 250 million gallons per day through five outfalls directly into Lake Michigan. This water is contaminated by oil and grease and suspended solids, as well as by other pollutant substances. Additional waste materials are disposed of in a deep well operated by the Corporation at the plant.

Pursuant to the Refuse Act of 1899, 33 U.S.C. §407, and regulations promulgated thereunder, U.S. Steel filed an application for a pollutant discharge permit on June 17, 1971. No permit was issued to U.S. Steel under the Refuse Act, because in 1972 the permit program under the 1899 Act was superseded by the Federal Water Pollution Control Act (FWPCA) which established a new system of discharge permitting and vested permit authority initially in the Environmental Protection Agency (EPA or the Agency).

However, U.S. Steel's permit application (along with those of thousands of other dischargers) continued to be processed (by EPA instead of by the Corps of Engineers) as if it had been submitted under the 1972 Act. Pursuant to the FWPCA and the regulations promulgated thereunder, EPA issued joint public notice with the Indiana Stream Pollution Control Board (Indiana SPCB) on September 4, 1974, of proposed National Pollutant Discharge Elimination System (NPDES) Permit Number IN 0000281 (the Permit) and of the Indiana SPCB's intent to certify the Permit. After receiving comments from the public and from the Corporation, the Indiana SPCB certified the proposed Permit on October 30, 1974, and EPA issued the Permit on October 31, 1974.

U.S. Steel requested an adjudicatory hearing to contest the Permit on November 18, 1974. That request was granted by the Agency on December 2, 1974, and EPA issued public notice of the hearing on January 9, 1975. During the 30-day period following issuance of the public notice, EPA received requests to be parties to the proceeding from a number of governmental agencies and public interest groups. In particular, the Indiana SPCB; the Illinois Environmental Protection Agency (Illinois EPA); Business and Professional People for the Public Interest (BPI); the Lake Michigan Federation; and the Chicago Department of Water and Sewers (Chicago DWS), all asked to take part in the hearing. EPA granted all of the requests and those parties participated in the entire proceeding.

Various prehearing submissions were filed by the parties, and the hearing began, as originally scheduled, on August 5, 1975. Shortly before the adjudicatory hearing convened, U.S. Steel filed a complaint in the United States District Court for the Northern District of Illinois for declaratory and temporary and permanent injunctive relief to prevent EPA from proceeding with the adjudicatory hearing. United States Steel Corporation v. Train, (N.D. Ill., Civil No. 75-C 2313). Simultaneously, the Corporation filed a motion with Administrative Law Judge Marvin E. Jones to stay all pending proceedings in the adjudicatory hearing. Upon denial of that motion by Judge Jones, U.S. Steel moved the District Court for a stay. The District Court denied the motion, as did this Court when the Corporation further petitioned to halt the proceedings. C.A. 7, No. 75-1695. Having failed to stop the progress of the administrative process, U.S. Steel participated in the adjudicatory hearing with EPA and the other parties. The hearing lasted from August 5 until August 21, 1975.

Following the hearing, EPA, U.S. Steel, and other parties filed proposed findings and conclusions with the Administrative Law Judge. On December 2, 1975, Judge Jones certified the hearing record and the proposed findings and conclusions to the Regional Administrator for EPA, Region V.

On January 30, 1975, the Regional Administrator remanded the case for further evidence. The remanded hearing was held on March 17, 1976, and several parties, including EPA and U.S. Steel, filed proposed findings and conclusions on the remanded issues. 1/

The Regional Administrator issued his initial decision on all contested issues on May 11, 1976. The initial decision upheld the Permit terms and conditions proposed by the EPA Region V Enforcement Division, and U.S. Steel filed a petition for the Administrator's review of the initial decision. After reviewing the Regional Administrator's action, the Administrator denied the petition on June 24, 1976, making the initial decision final and the Permit effective immediately. The Agency issued the Permit on June 25, 1976.

The Corporation filed its Petition for Review of the Permit in this Court on June 28, 1976, and then it filed a motion with the Regional Administrator for stay and for a temporary stay pending ruling. The Regional Administrator granted U.S. Steel's motion for temporary stay but denied the motion for stay on July 6, 1976.

1/ BPI and Lake Michigan Federation adopted EPA's position. Record, Item 141 at 1487-1488.

This case is now before this Court on U.S. Steel's Petition for Review and, more immediately, on its motion for stay pending appeal.

B. The Statutory Background of This Case:

The law which applies to this case is the Federal Water Pollution Control Act, as amended in 1972, 33 U.S.C. §1251 et seq., the primary objective of which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 101(a), 33 U.S.C. §1251(a). That statute represents a distinct break with prior efforts to control water pollution for at least two reasons pertinent here. First, permitting authority for the discharge of pollutants was shifted from the Corps of Engineers, where it had been vested by the Refuse Act of 1899, to EPA. Thus, the permit application originally filed with the Corps by U.S. Steel for its Gary Works was turned over to EPA for final processing.

Secondly and more importantly, the entire strategy of pollution control underwent a dramatic and radical change in the new Act. Prior to the 1972 amendments the Federal approach to pollution abatement centered upon water quality standards. The theory was that certain standards would be established, officials would determine which waters did and did not meet those standards, and then actions would be taken to reduce the

pollution of waters which failed to meet the standards. See former 33 U.S.C. §1151 et seq. It was a cumbersome system of limited effectiveness.

The water quality standard concept was not discarded in 1972, but the main focus of the FWPCA turned instead to the discharge of pollutants from individual industrial and municipal "point sources." The mechanisms for controlling the discharges of pollutants are now specific "effluent limitations" imposed upon dischargers in NPDES permits. Section 301 of the Act, 33 U.S.C. §1311, defines the degree of limitation imposed upon dischargers: At a minimum, all point sources (other than publicly owned treatment works) must achieve "not later than July 1, 1977, effluent limitations for point sources . . . which shall require the application of best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of this Act . . . ." 33 U.S.C. §1311(b)(1)(A). Of course, the "application of best practicable control technology" (BPT) does not mean simply having the equipment installed; it means operating that equipment in a manner which will meet required standards and limitations.

At this point it is critical to note that, although the BPT requirement is the 1977 focal point of the current Act, still, if BPT is not sufficient to insure compliance with water quality standards, limitations more stringent than BPT may be imposed upon a discharger. Section 301(b)(1)(C), 33 U.S.C. §1311(b)(1)(C).

Whether BPT or water quality is the standard, the effluent limitations applicable to each discharger are set out in a permit issued under Section 402 of the Act, 33 U.S.C. §1342, the provision which created the National Pollutant Discharge Elimination System. Permits issued under Section 402 include many terms and conditions, the most important of which are the effluent limitations required by Section 301, 33 U.S.C. §1311. There are two sets of effluent limitations in most permits: interim effluent limitations, which are effective prior to July 1, 1977, and final effluent limitations, which are effective no later than July 1, 1977. A schedule of compliance included in the permit is designed to insure that the discharger achieves final effluent limitations in a timely fashion. The schedule sets time increments by which the discharger must take specified actions, such as completion of engineering or beginning of construction, leading toward the achievement of final effluent limitations. Also included for purposes of determining compliance with the permit are monitoring requirements, imposed pursuant to Section 308 of the Act, 33 U.S.C. §1318. Although there may be many other conditions in permits, the ones of primary importance, as they pertain to this proceeding, are the effluent limitations, the monitoring requirements, and the schedule of compliance.

In the permitting process EPA is not the only governmental body which plays a major role. While EPA is issuing permits, a State must certify that the discharge in question will comply with various sections of the FWPCA before the Federal Agency can issue any permit. Section 401, 33 U.S.C. §1341. Furthermore, upon satisfactory demonstrations that a state meets the requirements of Section 402(b), 33 U.S.C. §1342 (b), EPA may approve a state program for purposes of both issuing and enforcing permits.

The regulations under which the Environmental Protection Agency conducts its NPDES functions are published in Part 125 of Title 40, C.F.R. See, also, 38 Fed. Reg. 13528-13540 (May 22, 1973); 39 Fed. Reg. 27078-27084 (July 24, 1974). These regulations establish procedures for issuing permits and create the adjudicatory process for reviewing permits.

The Permit before this Court, which U.S. Steel seeks to stay, is the culmination of a long and arduous legislative and administrative process. EPA, through its duly promulgated regulations, has carried out its statutory responsibility by issuing the Permit. That Permit, if it is allowed to operate and if the Corporation complies with its requirements, will bring about a long-overdue abatement of water pollution by the Gary Works.

II. PETITIONER HAS FAILED TO MEET THE FOUR CRITERIA FOR A STAY ESTABLISHED IN VIRGINIA PETROLEUM JOBBERS ASSOCIATION v. FPC

The legal standard for a stay of administrative action pending judicial review has been established by case law, and the leading case defining the four criteria which must be met for such a stay to be granted is Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921 (C.A.D.C., 1958).[2/] The Petroleum Jobbers court cut through a complex factual and legal maze to reach the ultimate issue of petitioner's entitlement to a stay of the Commission's order denying it the right to intervene in a proceeding before the Commission, and it identified the four tests a petitioner must meet in order to obtain a stay:

(1) "strong showing" of likelihood that petitioner will subsequently prevail on the merits;

(2) petitioner would suffer "irreparable injury" in the absence of a stay;

(3) substantial harm to other parties would not result from a stay; and

(4) the public interest would not be harmed by the grant of petitioner's request for a stay.

[259 F.2d at 925.] With respect to the fourth factor, the court emphasized the paramount nature of the public interest

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2/ Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942), cited by Petitioner in its Memorandum of Law at 3, does reaffirm the Court's inherent equity power, but it should be remembered that the issue in Scripps-Howard was a stay of enforcement of the Commission order rather than of the terms and conditions of the order itself. U.S. Steel is subject to the same enforcement potential as any NPDES permittee; however, the case now before this Court is not itself an enforcement action, although U.S. Steel, by its allegations, seems to lose track of that fact.

over that of private litigants in any litigation concerning regulatory matters. 259 F.2d at 925. It goes without saying that regulation of the environment must constitute the type of public interest contemplated by the court in establishing the public interest test.

Under the particular fact situation in Petroleum Jobbers, the court found that petitioner had made a factual show of probability of success on the merits, but it had failed to satisfy the other three criteria. 259 F.2d at 926. The attempted showing of irreparable harm was found to be inadequately substantiated. The court pointed out that "mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough" to constitute irreparable injury. 259 F.2d at 925. The Petroleum Jobbers court found that the question of harm to others resulting from a stay was not really before it and proceeded to what it obviously considered to be the crucial factor: "public interest consideration". 259 F.2d at 927. On this question, the court of appeals deferred to the Commission, and, furthermore, it found that an adequate remedy existed in the form of a petition for review of the Commission's action. 259 F.2d at 927. The presumption in favor of an administrative agency's interpretation of the public interest has been well stated by the Second Circuit in Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (C.A. 2, 1965), wherein the court defined the agencies' duty to protect the public interest:

> . . . This role does not permit [the Commission] to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.
>
> This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties. . . ." [354 F.2d at 620.]

The Environmental Protection Agency's judgment with respect to protecting the public interest by means of an enforceable NPDES permit should not be effectively repudiated by a stay in this instance, particularly where an adequate remedy exists in the form of a petition for review.

In Associated Securities Corporation v. S.E.C., 283 F.2d 773 (C.A. 10, 1960), the court denied stays of two S.E.C. orders -- one revoking a broker-dealer's registration and one upholding a dealer association's disciplinary action -- on the basis of Petitioners' failure to satisfy the test laid down in Virginia Petroleum Jobbers Association v. F.P.C., supra. While the Tenth Circuit found itself unable to assess plaintiff's likelihood of prevailing on the merits because the record had not been filed prior to the motion for stay, personal economic injury potentially sustained as a result of exclusion from earning a living in one's chosen vocation was held "not of controlling importance." What was of controlling importance,

though, was the necessity to protect the public from harm, which outweighed any potential harm to plaintiff. Petitioners had failed to sustain the burden of establishing no harm to the public interest; therefore, no stay was granted. 283 F.2d at 775. The court's rejection of damage to economic livelihood as satisfying the test or irreparable injury and finding that the Commission orders protected the public interest are particularly pertinent to the matter under consideration.

In International Waste Controls, Inc. v. S.E.C., 362 F. Supp. 117 (S.D.N.Y. 1973), aff'd 485 F.2d 1238 (C.A. 2, 1973), plaintiff sought a District Court injunction against an order of the Securities and Exchange Commission initiating an investigation of certain of plaintiff's activities. Among the court's grounds for denial of plaintiff's motion for preliminary injunction was the finding of a failure to show irreparable damage. Where the sole basis for the claim of irreparable damage is "grievous economic loss" the test had not been satisfied. 362 F. Supp. at 121. See, also, Hamlin Testing Laboratories, Inc. v. U.S.A.E.C., 337 F.2d 221 (C.A. 6, 1966), and Liberty National Bank and Trust v. Bd. of Governors, 312 F.2d 392 (C.A. 10, 1962).

Petroleum Jobbers was cited and followed in a per curiam decision by the Second Circuit in Eastern Airlines, Inc. v. CAB, 261 F.2d 830 (C.A. 2, 1958), wherein the court denied

the petition for stay on the basis of failure to satisfy the four requisite conditions. However, there was no opinion explaining the court's reasoning. Both Eastern Airlines v. CAB and Associated Securities Corporation v. S.E.C., supra are cited with approval by the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 156 (1967) for the proposition that petitioner bears the burden of establishing that the stay will not be harmful to the public interest.

The Supreme Court has also held that it is within an administrative discretion to grant or deny stays of its orders. In the Permian Basin Area Rate Cases, 390 U.S. 747, 767, 773 (1968), while noting that one who would overturn an agency's judgment undertakes a very heavy burden, the Court held that the Federal Power Commission had not abused its discretion by refusal to stay enforcement of area rate orders pending disposition of petitions for special relief. This is directly analogous to the Regional Administrator's refusal to stay the effectiveness of an NPDES permit pending the outcome of a petition for review in the Court of Appeals. The Permian Basin court cited Virginia Petroleum Jobbers Association, supra, as grounds for denying a stay, absent a showing of irreparable harm, but it did not further elaborate on what would constitute irreparable harm.

Applying the four Virginia Jobbers criteria to the instant case, it is clear that Petitioner has failed to satisfy its burden of justifying a stay of the effectiveness of NPDES Permit Number IN 0000281.

A. Petitioner Has Failed To Demonstrate That It Will Be Irreparably Harmed If The Permit Remains Effective

Virginia Petroleum Jobbers establishes the standard that a petitioner must show it will suffer "irreparable injury" if a stay is not issued. U.S. Steel alleges in its motion for stay pending appeal that it will suffer just such injury if a stay is not granted:

> Petitioner will be irreparable harmed if the contested terms and conditions of the permit are not stayed during the pendency of judicial review, because its only alternatives are to cease operations or operate in jeopardy of such civil and criminal penalties. [Motion at 10.]

In its attempt to substantiate this claim, though, the Corporation fails even to approach the Petroleum Jobbers standard.

A leading case in a district of the Seventh Circuit on the issue of staying an administrative action, United States Steel Corporation v. Robert W. Fri, 364 F. Supp. 1013 (N.D. Ind. 1973), interestingly enough, also involved the Gary Works. In that case, U.S. Steel filed a complaint seeking a declaratory judgment to set aside the EPA Administrator's order issued to the Corporation pursuant to the Clean Air Act of 1970, 42 U.S.C. §1857. EPA filed a motion to dismiss the complaint and a counterclaim for enforcement of the order. U.S. Steel moved for a stay of the order pending the outcome of the litigation. The claim of irreparable harm in the Fri case sounds remarkably similar to the allegations in the instant case:

> The irreparable harm alleged by plaintiff is that it is subject to criminal penalties under the order and must make decisions on whether to close facilities or install controls which will allegedly affect production and employment. [364 F. Supp. at 1020.]

In denying the motion for stay, the Court found that although plaintiff was likely to prevail on the merits in that case, the threat of irreparable harm to the plaintiff was not imminent and the public interest would be served best by denying the stay. Discussing the issue of irreparable harm more directly, the Court found that for plaintiff to proceed with preparation for compliance involved only possible economic harm and it would not interfere with the operation of plaintiff's business. 364 F. Supp. at 1021. Other more important considerations far outweighed the potential harm to the Corporation.

> A stay would encourage postponement of preparations by plaintiff for ultimate compliance duties, hinder defendants in their administrative duty of maintaining progress toward compliance with national health standards, discourage the Administrator from utilizing the conference procedure provided in the Act, and delay the resolution of planning problems which the Administrator has the expertise to resolve. This would compromise the objective of Congress to make restoration and maintenance of public health a paramount consideration and thwart the congressional policy to end delay in attainment of national environmental goals. [364 F. Supp. at 1021.]

The Court here is faced with nearly the same situation. Can the mere possibility of harm to U.S. Steel stand in the way of achieving the national goals of a cleaner environment? That question can be answered only in the negative.

In the instant case U.S. Steel alleges that irreparable harm flows from its being faced with only two courses of action with respect to the Permit: close the plant or operate in jeopardy of civil and criminal penalties. Motion, ¶15 at 10. Petitioner has a very limited perspective if those are the only two options it sees as being available. Perhaps U.S. Steel has not considered the possibility of doing what is necessary to comply with the Permit. 3/ There is also the alternative of seeking clarification from EPA and the Indiana SPCB of any Permit term that it might not be able to understand fully. In addition, U.S. Steel has the option of requesting a modification of the permit from the Indiana SPCB. Thus, Petitioner's allegation of irreparable harm is premised on the faulty assumption that only two alternatives are available, when several options apparently were not even considered by it.

Even assuming, arguendo, that the Corporation's actions are as limited as it asserts they are, still U.S. Steel has failed to present an argument which would support its motion for stay. With respect to a closure of the plant, the most dramatic support for Petitioner's argument seems to be a statement in the affidavit of Dr. Crist:

3/ The possibility that certain expenditures may be required of the Corporation in its efforts to comply with the Permit does not constitute irreparable harm within the meaning of the Petroleu Jobbers test. See discussion at 11-13, supra.

> Any attempt immediately to cease discharges and production would result in massive damage to property and severe danger to personnel. [Crist affidavit at 5.]

The suggestion that a closing would have to be so precipitous as to have the effects postulated by Dr. Crist defies common sense; indeed, it borders upon the absurd. The function of the Environmental Protection Agency is to abate environmental pollution. It is not to destroy property and endanger human life and limb. Presumably, if the Corporation chooses to cease operations at the Gary Works, it will do so in a safe and sensible manner.

Additionally, as EPA understands present market conditions, U.S. Steel is currently experiencing a period of high demand and, therefore, it is making as much steel as it can. Under these circumstances closure seems to be an option which the Corporation is unlikely to choose. Certainly during the period when the Permit was in effect - July 6 through July 14, 1976 - EPA heard nothing from U.S. Steel regarding plans to shut down the Gary Works.

Turning to Petitoner's second alleged option, continued operation in jeopardy of civil and criminal penalties is a situation which faces every discharger who holds an NPDES permit. Basically, individuals and corporations in every civilized society confront this same situation of being held accountable for their actions and of facing the legal consequences of their violations of the laws.

More significantly though, Petitioner's claims of a threat of possible civil or criminal actions do not rise above the level of mere speculation. The fears of prosecution expressed by U.S. Steel only reflect a fundamental misunderstanding of the administrative process and of the FWPCA. First, no enforcement action can be initiated until an agency has assembled information either from the monitoring reports of a discharger or through the efforts of its own investigatory personnel. Even after such data is in the hands of a regulatory agency, it must be processed and refined into a case which can be filed in court. All of this takes time.

Secondly, in the instant situation since January 1, 1975, Indiana has had primary enforcement authority over NPDES permits in that State. Therefore, EPA would first defer to the State to prosecute a permit violator. If the State failed to act, then EPA would probably proceed administratively with a notice of violation and an order. Section 309(a)(1), 33 U.S.C. §1319(a)(1). If instead a judicial remedy were chosen, that decision itself would absorb even more time. Thus, as a practical matter, until a good deal of administrative activity has occurred, no imminent threat of prosecution hovers over U.S. Steel.

As the Supreme Court stated in O'Shea v. Littleton, 414 U.S. 488, 495 (1974), "The injury or threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical.'" Petitioner, though, has not established a threat of irreparable

harm which is either real or immediate. Quite to the contrary, the Corporation offers no more than speculation and conjecture. 4/

B. Petitioner Has Failed to Establish A Substantial Likelihood of its Ultimately Prevailing on the Merits

In support of its argument on the second element of the Virginia Petroleum Jobbers, i.e., a substantial likelihood of success on the merits, Petitioners offers little more than unsubstantiated assertions of fact mixed with conclusions of law and, generally, a rehashing of issues already adjudicated. Respondent will address certain of the salient points raised by Petitioner individually below.

Nature of the Hearing

Petitioner has revived its legal challenges to the nature and scope of EPA adjudicatory hearings as a basis for its claim that it will ultimately prevail on the merits. Petitioner unsuccessfully pursued these challenges below in both the administrative proceeding and in the District Court in United States Steel Corporation v. Train, supra. Judging by

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4/ In its pleadings to some degree Petitioner has mixed the issues of irreparable harm and likelihood of success on the permits. Perhaps some such overlap is inevitable in this case, but, to minimize redundancy, Respondent will treat Petitioner's assertions of alleged defects in the Permit in its discussion of likelihood of success on the merits, which follows immediately hereafter.

the fact that on August 4, 1975, this Court also denied the Corporation a stay of the adjudicatory hearing in Number 75-1695, neither were those same arguments found to be persuasive in this forum.

Understanding the Permit

U.S. Steel asserts in its Motion that it "cannot determine with any degree of certainty the terms and conditions of the permit purportedly in effect." Motion at 10. This is preposterous. The only example given of allegedly ambiguous conditions is set forth on page 10 of Dr. Crist's affidaivt, and it relates only to the submission of reports. U.S. Steel's problem does not seem to be that it cannot understand the requirement, because the permit clearly requires submission of monitoring reports to the Indiana SPCB 15 days after the end of each month. Rather, Petitioner's problem seems to arise from an apparent inconsistency between the Regional Administrator's Decision and the Permit. If there is a discrepancy, this is clearly a ministerial error that can be corrected with minimal difficulty. To premise an assertion that the Permit cannot be understood and, therefore, must be stayed on grounds relating to the submission of reports is absurd. Furthermore, the permit is presented on a form used solely for U.S. Steel pursuant to a stipulation with EPA. 5/ It uses plain English and specific numerical limitations. Other permittees do not appear to have this difficulty, and the Corporation does not appear to have

5/ That agreement is appended to the Permit itself. Record, Item 148.

a problem understanding the effective NPDES permits for its Waukegan and South Works facilities and the agreed-upon NPDES permit for its Joliet facility in Illinois.

Monitoring Requirements

Petitioner argues that certain permit conditions which it can understand cannot be met. First, U.S. Steel claims it is impossible to comply with several monitoring requirements. For outfall 035 (GW-L-1), the Permit requires that the flow measurement frequency be "continuous" and that the same type be "rate recorded." Dr. Crist's affidavit confirms that the two components of the total flow from outfall 035 (GW-L-1) are monitored continuously. Crist Affidavit, ¶4(a) at 2. EPA has already indicated that the flow information that can be developed from these continuous monitoring devices will meet the Permit requirement.

For outfall 036 (GW-L-1A), the permit requires a composite sample to be taken. It is the Agency's understanding that U.S. Steel currently takes composite samples at this outfall. There is no reason why U.S. Steel cannot continue to do this. In addition, U.S. Steel alleges that a manhole must be installed to enable it to gather composite samples. Crist Affidavit, ¶4(b) at 3. The sampling location in the Permit is "a point representative of the discharge prior to entry into Lake Michigan," which gives U.S. Steel the flexibility to select any representative point. EPA has indicated to the Corporation already that points not requiring the installation

of a manhole would be acceptable monitoring locations. For discharges to the deep well, outfall IN-9, the Permit requires continuous pH monitoring. Petitioner claims this cannot be done. If this is so, U.S. Steel should now request a modification of this term of the Permit.

It is important to note that U.S. Steel has previously objected only generally to the Permit monitoring requirements, and it proposed infrequent and unsophisticated monitoring which would not provide an accurate characterization of the discharges. Characteristic of the Corporation's position is the statement of their witness, Dr. Jackson, who said, "The EPA's proposals are excessive from the standpoint of the amount of monitoring necessary to determine the performance at each of our outfalls. . . ." Record, Item 90, U.S. Steel Exhibit TE at 15-16. U.S. Steel never claimed at the hearing that it could not monitor outfall 035 continuously for flow, that it could not monitor outfall 036 using composite samples, or that it could not measure the deep well discharge continuously for pH. U.S. Steel has been aware of these requirements for over a year. It is very late for the Corporation to argue these points now, and no stay of these requirements is appropriate.

Schedule of Compliance

U.S. Steel asserts that the compliance schedule in the Permit is arbitrary because it includes dates which have already passed. Superficially, this is an appealing argument; however, it ignores the questions which are really at issue

in this case, i.e., the validity of the schedule at the time the permit was issued and the lawfulness of the July 1, 1977, requirement. As will become clear when the case is argued on the merits, schedules of compliance in NPDES permits are based on a logical sequence of design and construction of treatment facilities to be completed and operational by July 1, 1977, not upon the time required for a permittee to resolve its legal problems. 6/ U.S. Steel's unsubstantiated difficulty with obtaining construction permits from Indiana does not go to the merits of this case and cannot be weighed in any estimate of petitioner's likelihood of prevailing on the merits.

The appropriate remedy for altering dates past is a petition for modification to the Indiana SPCB, not a stay here which can only put those dates farther into the past. On this matter of dates past, though, it is noteworthy that efforts by EPA during the hearing process to accommodate the passage of time U.S. Steel now negatively characterizes as modifications of the Agency's position. Motion ¶16 at 10.

Interim Effluent Limitations

U.S. Steel next claims that it cannot comply with certain interim effluent limitations effective on the effective date of the Permit. The Corporation's own assertion is particularly revealing on this point:

6/ When a polluter chooses to challenge an administrative action, it is his time which runs, not that of the public. Cf. Train v. Natural Resources Defense Council, 421 U.S. 60, 92 (1975).

> . . . [M]athematical analysis of the sample data from the outfalls, including new evaluation of the most recent data available and more sophisticated statistical analysis establishes that there are at least 18 separate contested limitations out of a total of 64 limitations which are likely to be exceeded a substantial portion of the time. [Motion, ¶5 at 3-4.]

This statement is so replete with false premise for substantiating a request for a stay that it is difficult to select a point at which to begin the discussion. Looking at the first two words of the assertion, "mathematical analysis," one can see immediately that U.S. Steel is attempting to support its argument on an issue it lost at the hearing. EPA established that this mathematical or statistical analysis proposed by U.S. Steel is unnecessary for establishing effluent limitations. Record, Item 145 at 48-55. Next, U.S. Steel is now talking about "new evaluation" (original emphasis) of the data. The Court should not even entertain these arguments as the Corporation is going well beyond the record and what it presented at the hearing. The time for taking evidence, including that on new statistical theories, is over. In much the same vein, U.S. Steel talks about using the most recent data in its analysis. The appropriateness of the limitations must be judged on the basis of information available on the record, not on new data and new theories that Petitioner may have conceived.

Even if it were proper to accept U.S. Steel's use of the recent data, the conclusions reached are highly suspect. One only needs to compare Dr. Crist's affidavit of July 2, 1976, (Supplemental Record, Item 5 at 4-5), Dr. Crist's representations at the July 9, 1976 meeting (Spyopoulos affidavit, at 2), and Dr. Crist's affidavit of July 13, 1976. 7/ The first affidavit represents that, for a total of 8 daily average and 27 daily maximum effluent limitations, "Gary Works will be in extreme jeopardy of frequent exceedence of the limitations." Then, at the July 9 meeting, U.S. Steel stated that a total of 9 daily average and 11 daily maximum limits needed revision. Finally, in the July 13 affidavit, Dr. Crist represented that "Gary Works will be in extreme jeopardy of frequently exceeding" 7 daily average and 11 daily maximum limitations. Crist affidavit of July 13, 1976, at 4-5. It should be noted further that to get from the original 8 daily average limitations of concern to the 9 on July 9, U.S. Steel dropped its concern for the cyanide limitation at outfall 007 and added concerns for ammonia and phenol at outfall 017. Then, to get from the 9 problem average limitations back to the 7 in the July 13 affidavit, the concerns for ammonia and phenol limitations at 017 were dropped. The changes in U.S. Steel's

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7/ A copy of U.S. Steel's July 2 submission to EPA and the affidavit of Peter B. Spyopoulos are attached hereto as Exhibits A and B, respectively.

position on maximum limitations is even more dramatic and confusing. EPA finds it exceedingly difficult to determine what happened in the 11-day period between affidavits to cause all these changed concerns over daily average and daily maximum limitations. These inconsistencies strongly suggest that the suspect nature of statistical analysis was proven out.

Beyond these striking inconsistencies, the claims of frequent permit violations are otherwise unfounded. Using the July 13 affidavit as an example, U.S. Steel alleges that the average and maximum limitations for suspended solids at outfall 010,019, and 032 would be exceeded on a very frequent basis. The limitations are expressed as gross numbers, but the permit provides that net values apply when the suspended solids level in the intake exceeds specified average or maximum values. According to U.S. Steel's representations to EPA, the Corporation does not have information on the level of suspended solids in the intake. Spyopoulos Affidavit at 2. Thus, U.S. Steel cannot conclude that monitoring over the last six months showed violations or that violations will occur frequently in the future.

In general, the Corporation's calculations appear to fluctuate even more frequently and vigorously than the nature of the effluents themselves. U.S. Steel is unlikely to prevail on an argument which would preclude a regulatory agency from ever having a firm set of limitations to enforce, but

would instead be subject to change on an almost daily basis as new factors are constantly introduced into the mathematical equation.

Final Effluent Limitations

Petitioner alleges that it already has BPT installed and operating at the Gary Works and that the permit limits cannot be achieved by any known technology. Memorandum of Law, at 7 and 8). Certain limits are also challenged as being illegally based upon a waste load allocation study.

Although U.S. Steel does have equipment at certain Gary Works discharges which is representative of BPT technology, the effluents discharged from those outfalls are not meeting BPT limits. Unless the Corporation complies with BPT effluent limitations, as opposed to just installing certain treatment equipment, BPT is not achieved. Furthermore, the blast furnace discharge cannot be characterized as BPT either in terms of technology or effluent characteristics.[8/] Additionally, several grossly contaminated cooling water outfalls now escape treatment altogether.

U.S. Steel has gone one step farther and alleged that the permit limits are not capable of achievement by any known technology. Two points are worth noting:

1. Technology is not a consideration in applying limitations based on water quality standards in NPDES permits. Section 301(b)(1)(C) requires compliance with state standards

8/ See Exhibit C.

when these are more stringent than BPT, which is the case with respect to final limitations for ammonia, cyanide, phenol, chloride, fluoride and sulfate.

2. EPA presented treatment and disposal alternatives which are technologically feasible and would result in compliance with the permit.

Other Issues

Petitioner's arguments regarding deepwells, thermal discharge demonstration, and intake studies are bare conclusions of law. They do not constitute a record upon which this Court can make a judgment as to Petitioner's likelihood of success on the merits.

In sum, it is possible that on some issues raised in the instant petition U.S. Steel may prevail on the merits, but at this juncture that possibility is nothing but an exercise in speculation. Certainly the Corporation has offered nothing yet which would raise that speculation from the level of a reflection of Petitioner's current hopes to the level of a substantial likelihood of ultimately prevailing on the merits generally.

C. The Issuance of Stay Would Substantially Harm Other Parties Interested in the Proceedings

The third test set down in Virginia Petroleum Jobbers is whether the issuance of the stay would harm other parties interested in the proceedings. To apply this test to the instant case, one must first identify parties interested in the

proceedings and then determine to extent of harm that would be inflicted on them by a stay.

Probably the best place to look for parties interested in the case is the administrative proceeding which gave rise to the appeal. Those parties with a sincere interest in the outcome took the time and expended the resources to present their positions at the hearing. Thus, it is the Indiana Stream Pollution Control Board, the Illinois Environmental Protection Agency, the Chicago Department Water and Sewers, the Lake Michigan Federation, and BPI which are the other parties which must be considered in applying the test.

Rarely are there situations where Federal, State, and local agencies, along with citizens' groups, are so uniform in their purpose as in this case. Here, the United States Environmental Protection Agency, the Indiana SPCB, the Illinois EPA, the Chicago DWS, the Lake Michigan Federation, and BPI, are all in agreement that the pollution from the Gary Works and the harm which that pollution inflicts upon Lake Michigan and the Grand Calumet River must be brought under control.

The primary interest of all these parties is Lake Michigan. The precise nature of the interest varies from party to party, but all the interests are linked directly to improving the quality of the water in Lake Michigan. The Chicago DWS, for example, utilizes Lake Michigan as a drinking water supply for more than 4.6 million people in the Chicago area. With its 68th Street intake located only nine miles from the Indiana Harbor

area where the polluted water from the Grand Calumet River enters the Lake, they have a very special interest in the pollution that is occurring there. It should be noted that several communities in northwest Indiana also get their drinking water from Lake Michigan, and have similar interests which would be affected. The Indiana SPCB is responsible for protecting the waters of that State, including Lake Michigan and the Grand Calumet River from pollution. As a part of the Indiana State Board of Health, the Indiana SPCB's interest is to carry out its responsibility. In that Lake Michigan is also water of the State of Illinois, having the political boundary with Indiana only three miles from the Indiana Harbor area, the Illinois EPA has an interest in protecting the waters of Illinois. Continued pollution of the Lake is contrary to that interest. The Lake Michigan Federation and BPI are both public interest groups with members who use and enjoy Lake Michigan. The groups' interest is to protect the Lake from pollution, and to enhance the possibility of continued use and enjoyment of the Lake for their members.

Of central importance to the question of whether or not to grant a stay of the Permit is the issue of U.S. Steel's responsibility for its action in discharging 500 million gallons per day of polluted water per day to the Grand Calumet River and 250 million gallons per day of polluted water to Lake Michigan. To stay the effectiveness of the Permit will lead to

at least three results directly detrimental to the interest of other parties: first, a stay of monitoring requirements will allow U.S. Steel to continue discharging without an effective means of accurately characterizing the pollution; secondly, a stay of interim limitations will remove the incentive for U.S. Steel to operate its existing central systems properly; finally, and perhaps most importantly, a stay of the compliance schedule will allow U.S. Steel to continue deferring its investments in water pollution control equipment and thereby defer the more extensive pollution clean-up required as a matter of law by July 1, 1977. All of these factors are directly and substantially detrimental to the interest of the other parties identified above.

D. The Public Interest Requires an Effective NPDES Permit Covering the Gary Works

In a move somewhat surprising for its sheer boldness, U.S. Steel argues that a stay of its NPDES Permit would benefit the public interest. Memorandum of Law at 11. On its face that assertion strains credibility when one considers that the pollutants which the Gary Works is discharging into the waters include cyanide, phenols, ammonia, oil and grease. The national policy established in the FWPCA is one of reducing the level of water pollution. As expressed in Section 101(a) of the FWPCA, Congress has determined that it is in the public interest ". . .

to restore and maintain the physical, chemical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The NPDES permit issued for Gary Works requires that existing discharges be maintained at a particular level pending the future abatement of those discharges pursuant to a schedule of compliance.

The D. C. Circuit in Virginia Petroleum Jobbers emphasized the primary of the public interest over that of the private litigant in the administration of regulatory statutes designed to protect the public interest. 259 F.2d at 925. Congress has clearly defined the public interest as pollution control to be effected through compliance schedules in NPDES permits. To stay the effectiveness of this Permit would thwart congressional intent with respect to protecting the public interest. The public interest, as defined by U.S. Steel, more closely resembles the interest of the private litigant - in this case, to do nothing. Only by the most tortured of reasoning can U.S. Steel even suggest that further delay will serve the public interest.

By arguing in the negative, that maintaining an effective Permit pending the outcome of its appeal will not serve the public interest, (Memorandum of Law at 12) U.S. Steel has overlooked the statutory scheme for reviewing agency action.

By including Section 509(b), 33 U.S.C. §1369(b), in the Act Congress clearly intended to expedite review of NPDES permits so as to insure compliance within the first level of treatment no later than July 1, 1977. To stay the effectiveness of this or any permit pending Court of Appeals review clearly jeopardizes a discharger's ability to comply with Section 301(b)(1) of the FWPCA. Here this is especially true in light of Petitioner's failure to take any meaningful abatement measures since 1972. Exhibit C, Excerpts from Hearing Transcript.

U.S. Steel states that the contested terms and conditions of this permit have been stayed since the adjudicatory hearing request was granted (November, 1974). This represents just one example of U.S. Steel's record of avoiding the commencement of pollution abatement at the Gary Works.

It would appear that U.S. Steel, at least with respect to the Gary Works facility, has persistently resisted embarking upon a pollution control program. However, the Regional Administrator addressed this situation in the conclusion of his Denial of Petition for Stay Pending Appeal:

> . . . [T]here must come a time at which each Permittee begins on the road to eventual compliance. Without even a beginning by Petitioner toward the implementation of the requisite pollution controls, through its Permit compliance schedule, it is highly doubtful whether the public interest may be properly served.

If this Court further stays the Gary Works permit, the company will continue to avoid that beginning.

III. CONCLUSION

Because a ruling denying Petitioner's Motion for a Stay and lifting the temporary stay now in effect is vital, Respondent concurs in U.S. Steel's requests for an expedited ruling and for oral argument.

With respect to the merits of Petitioner's Motion to Stay the effect of its NPDES Permit, the Corporation has flatly failed to carry its burden of meeting the four criteria set out in Virginia Petroleum Jobbers Association v. FPC:

1. No irreparable harm has been shown;
2. A substantial likelihood of prevailing on the merits is not supported by Petitioner's submissions;
3. The participation by third parties supporting the issuance of an effective Permit rebuts the contention that such parties will not be harmed by a stay; and
4. The public interest, as it has been perceived by Congress, not as U.S. Steel perceives it, requires an effective Permit for the Gary Works.

For the foregoing reasons, Respondent requests that the Motion for Stay be denied and that the stay of the Permit now in effect be lifted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Motion for Stay Pending Appeal was served upon Jay A. Lipe, Esquire, and James T. Harrington, Esquire, Rooks, Pitts, Fullagar and Poust, 208 South La Salle Street, Suite 1776, Chicago, Illinois, 60604, counsel for Petitioner, by United States mail, properly addressed and postage prepaid, on this 28th day of July, 1976.

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